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No. 08-910

# In the Supreme Court of the United States

GENE A. TYRRELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's convictions for conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), and for money laundering, in violation of 18 U.S.C. 1956(a)(1)(A), should be set aside based on an alleged failure by the government to establish that the "proceeds" involved in the laundering transactions were "profits" of the underlying unlawful activity.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-42) is not published in the Federal Reporter but is available at 269 Fed. Appx. 922.

### JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on June 9, 2008 (Pet. App. 43-44). The petition for a writ of certiorari was filed on September 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to commit fraud, in violation of 18 U.S.C. 371, seven counts of mail fraud, in vio-

lation of 18 U.S.C. 1341, conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), and seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). He was sentenced to 136 months of imprisonment. The court of appeals affirmed. Pet. App. 1-42; see Gov't C.A. Br. 4.

1. Danny Wey and Gregory Schultz created a company named Millennium Investment, Inc., and a related entity Millennium Investment, Inc. Trust (MIIT), which marketed and sold unregistered securities to raise capital for Millennium. The MIIT notes falsely claimed that they were guaranteed by the Bank of Bermuda Limited, and MIIT's disclosure documents neglected to mention Wey's prior felony fraud conviction. Dean Sinibaldi marketed many of these notes for MIIT. Pet. App. 4-6.

When MIIT began defaulting on its obligations, its owners and Joseph Cuciniello incorporated a group of 15 Florida and New York entities known as The Stonehedge Group (Stonehedge). Stonehedge's marketing materials advised that its funds would be invested in Millennium and falsely claimed that Millennium's principals had 40 years of experience in providing funds to companies about to make initial public stock offerings. Between March 1998 and November 2000, victims turned over more than $12.5 million to Stonehedge. Although petitioner represented that 85% of that money would be invested, only approximately 20% was actually invested, and 33% was paid in commissions to petitioner and others who sold the Stonehedge securities. Pet. App. 6-8; see Presentence Investigation Report 4 (PSR).

Petitioner began marketing Stonehedge securities in the fall of 1998. He created a training manual and instructed new salesmen at seminars. After petitioner and the sales organization that he headed became involved,

the monthly funds invested in Stonehedge increased from less than $100,000 to approximately $1 million. Petitioner also became the president and sole shareholder of one of the Stonehedge entities. In that capacity, he signed and issued $491,000 worth of stock shares to investors, most of which they ultimately lost. Pet. App. 9-10; Gov't C.A. Br. 11-12.

In October 1999, Florida officials sought an injunction to shut down MIIT and Stonehedge, naming Schultz, Wey, Cuciniello, and Sinibaldi as relief defendants. Petitioner and his co-conspirators then began marketing their securities through Stonehedge entities based in New York and processing sales through petitioner's Arizona-based company. At the same time, petitioner directed that his Stonehedge commissions be paid to an entity recently registered by his wife, which then remitted the commissions to an entity he controlled. Even after the state court injunction, petitioner and his co-conspirators collected $3.2 million from investors. In total, Stonehedge investors lost $11.4 million. Pet. App. 10-12.

2. Petitioner, along with Schultz, Sinibaldi, Cuciniello, and others, was first indicted in December 2002 and charged again in a second superseding indictment in November 2004. See Pet. C.A. Br. 2-3. As relevant here, that indictment charged petitioner in Count 23 with conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h), and in Counts 32 through 38 with money laundering, in violation of 18 U.S.C. 1956(a)(1)(A). Second Superseding Indict. 25-32, 35-36.

Each of the substantive money laundering counts alleged that petitioner and the other conspirators had conducted a financial transaction involving the "proceeds of specified unlawful activity, that is mail

fraud, * * * with the intent to promote the carrying on of specified unlawful activity." Second Superseding Indict. 35. Each of those counts involved lulling payments made to earlier investors using funds fraudulently obtained from later investors. For example, Count 32 involved a "dividend" payment sent to an investor in January 1999 accompanied by a letter advising that Stonehedge was "looking forward to fantastic growth in the coming year." Gov't Exhs. 217B, 217C. The conspiracy count was likewise predicated in part on an agreement by petitioner and his co-defendant to withdraw "proceeds of victim checks" and to use those "new investor funds to make principal and interest payments to prior investors." Second Superseding Indict. 26-27.

3. On appeal, petitioner (together with Sinibaldi and Cuciniello) argued that a mistrial should have been declared when co-defendant Schultz was severed from the case mid-trial and that the government had failed to prove scienter. Pet. App. 2 n.1, 41. At no point did petitioner argue to either the district court or the court of appeals that the funds involved in the money laundering counts were not "proceeds." See Pet. 10 (petitioner's concession that he made no such argument in the courts below).

The court of appeals affirmed petitioner's convictions. It concluded that no evidence admissible only against Schultz had been admitted and that the court's instructions eliminated any risk of prejudice from the failure to sever Schultz until the middle of the trial. Pet. App. 13-16. The court further found that "an abundance of evidence adduced at trial proved [petitioner's] knowing and voluntary participation in the charged conspiracies." *Id.* at 41.

4. Petitioner and his co-defendants filed petitions for rehearing. On June 2, 2008, while those petitions were pending, this Court held in *United States* v. *Santos*, 128 S. Ct. 2020 (2008), that, to establish promotional money laundering in violation of Section 1956(a)(1)(A)(i) based on transactions involving the "proceeds" of an illegal gambling business, in violation of 18 U.S.C. 1955, the government must prove that the transactions involved the profits, rather than the gross receipts, of the business.

Thereafter, Sinibaldi filed a motion for rehearing or in the alternative to file a supplemental brief pursuant to *United States* v. *Santos*. Petitioner did not file any motion based on *Santos*. The court of appeals denied the petitions for rehearing and denied Sinibaldi leave to supplement his petition to raise a new issue.

## ARGUMENT

Petitioner contends (Pet. 5-20) that this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of *United States* v. *Santos*, 128 S. Ct. 2020 (2008). Petitioner further contends that his money laundering convictions are invalid because the government failed to prove that the "proceeds" involved in the laundering transactions were "profits" of the underlying fraud. Pet. 15-16. Those challenges are not properly before this Court, and they lack merit in any event. Accordingly, the Court should deny the petition for a writ of certiorari.

1. Petitioner did not properly preserve for this Court's review any challenge to his convictions based on the meaning of "proceeds" in 18 U.S.C. 1956(a)(1), which was at issue in this Court's decision in *Santos*. Peti-

tioner argued in the courts below only that he did not knowingly participate in a conspiracy to defraud investors. He made no argument based on the meaning of the term "proceeds" in Section 1956(a)(1), and the court of appeals did not address that issue. Unlike his co-defendant Sinibaldi, petitioner did not even attempt to raise a *Santos* argument while his petition for rehearing was pending before the court of appeals. Indeed, petitioner concedes that he failed to raise any *Santos* argument in the courts below. See Pet. 10. That default should preclude review here. If petitioner believes that his conduct did not amount to money laundering in light of *Santos*, then his proper recourse is to file a motion for collateral relief under 28 U.S.C. 2255, where he could attempt to make the factual showing of actual innocence necessary for him to overcome his procedural default. Cf. *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998).

Like petitioner, Sinibaldi filed a petition for a writ of certiorari with this Court, arguing in part that his money laundering convictions were precluded by *Santos*. Pet. at 16-17, *Sinibaldi* v. *United States* (No. 08-590). This Court denied Sinibaldi's petition for a writ of certiorari. *Sinibaldi* v. *United States*, 129 S. Ct. 663 (2008). The Court should deny the instant petition as well.

2. Even if petitioner's claim based on *Santos* were properly presented, it would not warrant relief at this time. Contrary to petitioner's suggestion (Pet. 4), *Santos* did not hold that "proceeds" universally means "profits" in Section 1956. No opinion in *Santos* spoke for the majority of the Court. The result in *Santos* was that, in order to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) in which the government alleges that the

defendant laundered the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, the government must prove that the alleged laundering transactions involved the profits, rather than the gross receipts, of the business. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Because of the fractured nature of the decision, however, *Santos* does not resolve the meaning of "proceeds" as applied to other forms of "specified unlawful activity" (SUA). Because petitioner's convictions rest on a different predicate SUA than the one involved in *Santos* (mail fraud rather than operating an illegal gambling business), *Santos* is not controlling here.

The general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). As this Court has recognized, however, the *Marks* test is frequently "more easily stated than applied." *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003); *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994). In some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Ibid.* (concluding that it was "not useful to pursue the *Marks* inquiry").

Where there is no "one opinion [that] can meaningfully be regarded as 'narrower' than another" in the sense that it is a "logical subset of other, broader opinions," the traditional *Marks* analysis does not apply. *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S.

1229 (1992)), cert. denied, 540 U.S. 1103 (2004); *e.g.*, *United States* v. *Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-170 (3d Cir.), cert. denied, 528 U.S. 1003 (1999). In such a case, it may be possible to find a legal theory shared by a majority of the Justices by looking to a combination of the plurality or concurring opinions and the dissent. See, *e.g.*, *Johnson*, 467 F.3d at 64-66. But where that inquiry also proves unavailing, then "the only binding aspect of [the] splintered decision is its specific result." *Anker Energy Corp.*, 177 F.3d at 170.

That is the situation with *Santos*. Although the plurality opinion suggests that Justice Stevens's concurring opinion rests on a narrower ground, 128 S. Ct. at 2031, neither Justice Stevens's opinion nor the plurality opinion is a "logical subset" of the other. The plurality opinion rests on a rationale that "proceeds" has a single meaning for all SUAs, and that meaning is "profits." See *id.* at 2029-2030. Justice Stevens's opinion is based on the rationale that "proceeds" has a different meaning for different SUAs. *Id.* at 2033. Neither opinion is a logical subset of the other or can provide a common denominator because the opinions rest on inconsistent premises. Similarly, neither opinion can be combined with the reasoning of the dissent to generate a controlling legal principle because the dissent concludes that "proceeds" always means "gross receipts." *Id.* at 2044. The dissent thus rejects both Justice Stevens's premise that "proceeds" has different meanings for different SUAs and the plurality's conclusion that "proceeds" means "profits." See *ibid.* Accordingly, the only binding aspect of the *Santos* decision is its specific result, which does not address the circumstances of petitioner's case.

See *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("The precedential value of *Santos* is unclear outside the narrow factual setting of the case.").

Because *Santos* does not clearly resolve the meaning of "proceeds" for petitioner's case, *Santos* would not entitle petitioner to any relief even if his claim were properly presented. As noted above, petitioner did not raise a *Santos* claim in the district court. Accordingly, his claim would be subject (at most) to review for plain error, and he would be entitled to relief only if he could show, among other things, that the district court committed an "obvious" error. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Given the uncertainty about whether the "profits" requirement applies to petitioner's offenses, petitioner could not make that showing.

3. Even if the "profits" requirement clearly applied in this case, the transactions in *Santos* are distinguishable from those involved here. In *Santos*, the charged financial transactions consisted of payments of winning bettors and runners' salaries using the proceeds of an illegal lottery operation. Members of the Court concluded that the "profits" definition of "proceeds" was necessary to avoid treating the payment of such "normal" or "essential" expenses of a gambling business as money laundering. *Santos*, 128 S. Ct. at 2027 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). Those Justices were concerned that, if the money laundering statute covered paying the essential expenses of the underlying crime, then the money laundering charge would "merge[]" with the proceeds-generating crime (yet produce a higher penalty), *id.* at 2026-2028 (plurality opinion), so that a separate conviction for money laundering would be tantamount to a second con-

viction for the same offense, *id.* at 2032-2033 (Stevens, J., concurring in the judgment).

This case does not present the merger problem that concerned the Court in *Santos* because the transactions underlying the money laundering charges against petitioner did not involve the payment of "essential" expenses of the fraudulent scheme. As noted above, the money laundering charges against petitioner alleged that the conspirators deposited the proceeds of victims' checks into bank accounts and then used those proceeds to make payments to earlier investors, lulling them into believing their funds had been invested and thus promoting the continuation and expansion of the fraud. Such expenditures, unlike, for example, the cost of producing and mailing the fraudulent notes and marketing materials, were not "essential" expenses of the fraud operation. Indeed, the vast majority of later investors never received any lulling payments, so those payments cannot be deemed essential to the scheme. Accordingly, petitioner errs in contending that his transactions, by definition, cannot qualify as transactions in "profits" under *Santos*.

Petitioner's related contention (Pet. 16) that the government failed to prove that the underlying fraud generated profits is belied by the record. Stonehedge raked in $12.5 million in approximately two years, and a third of those funds were paid out as commissions. Pet. App. 8. Sinibaldi received $465,234.47, and Cuciniello and his family received more than $850,000. *Id.* at 6, 8. Petitioner too received sizable payments for selling the fraudulent Stonehedge securities. See PSR 4; Gov't C.A. Br. 14; Gov't Exh. 1S (detailing payments of more than $1.3 million to corporations controlled by petitioner and his wife). Those payments could not have been

made if the scheme's receipts had been completely consumed by its expenses. Accordingly, at this stage of the case, petitioner cannot establish that the charged transactions involved only the gross receipts of fraud, rather than the profits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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